87-1795

Supreme Court, U.S.
FILED
APR 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

RAINBOW TOURS, INC. D/B/A
RAINBOW COACHES,

PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the practice and procedures of the National Labor Relations Board in backpay proceedings deprive a party with the burden of proof of access to material evidence in violation of the National Labor Relations Act and the Fifth Amendment of the United States Constitution?
2. Whetner a Hawaii statute which prohibits the National Labor Relations Board from obtaining state unemployment insurance records of backpay claimants, is preempted by the National Labor Relations Act (29 USC §161(1)) which empowers the Board to subpoena relevant information in the administration of the Act?

3. Where a backpay claimant knowingly fails to disclose interim earnings on his federal income tax return and the Board deems his conduct "reprehensible", does the Board violate the public policy objectives of the NLRA and the Internal Revenue Code, 26 USC §6001 by awarding backpay?

4. Where claimants are concededly offered reinstatement to their former positions but would forfeit seniority, must back pay be tolled pursuant to the principles set forth in Ford Motor Co. v. EEOC, 458 US 219 (1982)?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Petitioner: Rainbow Tours, Inc. dba Rainbow Coaches.[1/]

Respondent: National Labor Relations Board.[2/] Hawaii

1/ Rainbow Tours, Inc. has no parent corporation, subsidiaries or affiliates.

2/ Although technically not parties to the proceedings below, except Ronald Sai, the backpay claimants are as follows:

Simeon Agao, Jr.
Michael Akamine
Miles Fonseca
Yukio Iho
Lane Kaaiai
Eric Kama
Ralph Kaui
James Louis
Ronald Sai
Henry Sanford
Paul Iwata

Teamsters and Allied Workers,
Local 996, International Brotherhood
of Teamsters, Chauffeurs, Warehousemen
and Helpers of America, Ronald Sai, an
individual.

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OPINIONS BELOW

The memorandum opinion of the Court of Appeals (No. 86-7630) is unpublished and is reproduced in the Appendix at App.-1-22. The NLRB decisions concerning backpay are reported at 266 NLRB 585 (1983) [partial summary judgment] and 280 NLRB No. 17 (1986) and are reproduced in the Appendix at App.-23-33 and App. 34-363.

The NLRB decision is the underlying unfair labor practice case is reported at 241 NLRB 589 (1979) and is reproduced in the Appendix at App. 364-454. That decision was enforced by the Ninth Circuit without opinion, 628 F.2d 1357 (9th Cir. 1980). App. 455.

JURISDICTION

The Court of Appeals' Memorandum Opinion was filed on December 4, 1987. App. 1. The Court of Appeals denied Rainbow Tours, Inc.'s (hereinafter Rainbow) petition for rehearing and suggestion for rehearing en banc on February 2, 1988. App. 479-480. Judgment was entered on February 18, 1988. App. 456-478. Rainbow has filed this petition for certiorari within 90 days from the date of denial of the petition for rehearing as required by 28 USC §2101(c) and Supreme Court Rules 20.2 and 20.4. This Court has jurisdiction under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Constitutional Provisions, Statutes and Regulations are Reproduced in the Appendix at App. 505-537. They are as follows: United States Constitution Amendment V App. 505; Article 6, Clause 2 App. 505; National Labor Relations Act, 29 U.S.C. §161(1) App. 505-511; 29 CFR §102.66(C) App. 508-511; Hawaii Revised Statutes H.R.S. §383-95 App. 511-515; H.R.S. §383-30 App. 515-531; Admin. Rule 12-5-55 App. 531-537.

STATEMENT OF THE CASE

A. THE UNDERLYING UNFAIR LABOR PRACTICE CASE

Rainbow Tours, Inc. operates tour buses on the island of Oahu, Hawaii.

On January 30, 1977, employees of Hawaiian Scenic Tours, a Teamster-organized competitor of Rainbow, commenced mass picketing outside the premises rented by Rainbow, a struggling bus operation at the time. Upon reporting for work at dusk, some of Rainbow's employees did not cross the picket line and one who did later abandoned his work due to fear. Rainbow Tours, Inc., 241 NLRB 589, 592-593 (1979) App. 392-396. The NLRB ruled that Rainbow violated Sections 8(a)(1) and (3) of the NLRA by discharging ten employees for

refusing to cross the picket line. App. 364-371.[3/] Five of the dischargees were full-time tour bus drivers and five were part-time tour bus drivers. 241 NLRB at 595. App. 413-414.

The Board found that the Claimants were discharged but offered reinstatement during a meeting on January 31, 1977. A condition of reinstatement, however, was loss of seniority. The Claimants rejected this offer. 241 NLRB 589 at 593-594 App. 402-404.

3/ In a subsequent, related civil action, the picketing was found to be a tortious interference with the employer's business. Rainbow Tours v. Hawaii Joint Council, 704 F.2d 1443, 1447 (9th Cir. 1983).

The Ninth Circuit Court of Appeals enforced the Board's unfair labor practice decision and order without a published opinion. NLRB v. Rainbow Tours, 628 F.2d 1357 (9th Cir. 1980). App. 455.

B. THE BACKPAY PROCEEDINGS

1. Refusal To Allow Discovery

The backpay Claimants were discharged in January, 1977. The Board violated its internal policies by failing to contact the Claimants with forms to document interim earnings and mitigation efforts until 1982. The hearing officer found:

> The claimants were discharged at the end of January 1977. The Board, contrary to recommended but not required practice, failed to solicit information from the discriminatees until 1982. This

> delay understandably made it difficult for the individual discriminatees to list with specificity and accuracy the details of their job search and led to last minute disclosures and recollections after face to face interviews and discussions.

ALJ Backpay Dec. p. 8 App. 70.

Many forms belatedly sent to the claimants to document mitigation efforts were returned blank. ALJ Dec. p. 69 App. 302, Resp. Exhs. C-4, F4, App. 481-504.

With the burden of proving failure to report interim earnings and failure to apply for suitable work, Rainbow petitioned the Board to allow prehearing depositions of the claimants. The petition was denied without explanation. 266 NLRB 585, 586 n. 5 (1983) App. 33.

Thereafter, Rainbow secured subpoenas to obtain documentation

regarding the claimant's availability for work, job searches, and interim earnings. Rainbow subpoenaed the State of Hawaii Department of Industrial Relations for unemployment insurance records of the claimants.[4/] The unemployment insurance subpoenas were revoked pursuant to the Board's interpretation of a state privacy statute which regulates disclosure of unemployment

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4/ The Hawaii Employment Security statute and regulations require unemployment insurance benefit recipients to apply for suitable work or forfeit benefits. The statute also provides for benefit cutoff if claimants leave employment without good cause or are terminated for misconduct connected with work. Said records would thus serve to document job search efforts and/or failure to mitigate damages. HRS 383-30(3), "Disqualification of Benefits" App. 515-531; Admn. Rule 12-5-55, Failure to Apply for Work. App. 531-537

insurance documents, HRS §383-95, App. 511-515. ALJ Dec. pp. 10-12 App. 75-81, Court of Appeals Memorandum Opinion, p. 5 App. 9-11.

Rainbow had also subpoenaed Claimant bank records for purposes of impeachment through undisclosed interim earnings. For example, a record indicating regular deposits in a savings or checking account during periods of asserted unemployment may reveal hidden interim earnings. The hearing officer revoked these subpoenas on grounds that Rainbow had failed to establish the "relevancy" of the subpoenaed documents which Rainbow was never allowed to see. ALJ Decision, p. 16 App. 91-95. The Board denied special appeal of the revocations during the trial, advising

Rainbow that it could renew its contentions in exceptions to the hearing officer's decision. App. 33a-33b. Rainbow did so, but the Board, three years later, never ruled on the point. The Court of Appeals upheld the hearing officer's reasoning concerning the subpoena revocations. Memorandum Opinion, pp. 5-6 App. 11-13.

2. Backpay Granted Despite "Represensible" Failure To Report Interim Earnings On Federal Tax Returns

The largest backpay award went to part-time driver, Miles Fonseca (over $36,000, including interest). Fonseca admitted that he failed to report interim earnings on his tax returns. The Board deemed his conduct "reprehensible" yet awarded Fonseca

backpay for the year in which the fraud occurred.[5/]

The Board summarily affirmed the ALJ's backpay decision. Rainbow Tours, Inc., 280 NLRB No. 17 (1986) App. 34-37. The total backpay award exceeds $200,000, including interest.

Ninth Circuit Appellate jurisdiction was grounded on 29 U.S.C. §160(f).

REASONS FOR GRANTING THE WRIT

There are hundreds of NLRB backpay proceedings annually. Between

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5/ "Fonseca's admission that he did not report some of the interim earnings he received on his tax returns is reprehensible; however, it is not the type of concealment that would toll backpay." [ALJ Dec. p. 46, App. 210]

January, 1986 and February 1988, 316 backpay specifications were filed with the Board. Source: 2/25/88 Board reply to Rainbow FOIA request.

Supreme Court review of the issues presented will resolve important questions of law and procedure in backpay proceedings. The Board's current practices, as reflected in its decision and the decision of the Court of Appeals, moreover, appears to conflict in principle with decisions of this Court.

1. This Case Presents A Clear View Of How NLRB Procedures Prevent Discovery And Introduction Of Material Evidence

The Board's backpay procedures deny Respondent's due process.[6/]

The respondent has the burden of proving claimants concealed earnings or failed to make reasonable efforts to gain and retain employment. See ALJ Backpay Decision p. 5 App. 55:

6/ In NLRB v. Ironworkers, 466 U.S. 720 (1984) the Supreme Court reaffirmed the rule in NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969) that inordinate delay by the Board in issuing a backpay specification does not, standing alone, deny a company due process. The Court noted, however, that it did not "... foreclose challenges that might be raised to the conduct or outcome of the supplemental backpay proceedings." 466 U.S. at 726.

> That General Counsel accumulates information does not indicate any assumption of an obligation to show whether the discriminatees took reasonable and sufficient steps to mitigate backpay. The employer has the burden of proving the affirmative defense of failure to mitigate.

The five year hiatus in communication between the claimants and the NLRB resulted in no contemporaneous documentation of interim earnings and mitigation efforts. Denial of pre-hearing discovery and revocation of subpoenas demanding unemployment insurance and bank records left Rainbow to rebut or impeach the bare factual assertions of the claimants without available information that would logically test the truth of those assertions.

Due process requires that respondents have a viable opportunity

to test witness credibility with potentially impeaching information. See, NLRB v. Indiana & Michigan Electric Company, 318 U.S. 9 at 28 (1942):

> Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

2. The Subpoenas Were Revoked On Erroneous Legal Premises Which, If Upheld, Will Serve To Undermine Due Process In Future Backpay Proceedings

The Board ignored precedent and the express language of the NLRA when it required Rainbow to establish the relevancy of subpoenaed claimant bank records without being allowed to see these records. The NLRA requires that

subpoenaed information must simply "relate to any matter ... in question in the proceedings ... ." 29 U.S.C. §161(1). App. 505-506. See, also, 29 C.F.R. §102.31(b) (1988) App. 508-510.

Requiring a respondent to establish the legal relevance of subpoenaed documents without being allowed to see them conflicts also with General Electric, Inc. v. NLRB, 341 F.2d 367, 376 (9th Cir. 1965) relied upon by the Ninth Circuit in affirming the Board's Order. There, the court noted the difficulty encountered in demonstrating relevancy without seeing the documents and ruled that relevancy may be described in the most general terms for purposes of defeating a motion to revoke a subpoena.

The Court upheld the Board's revocation of subpoenas to the state unemployment insurance office on the basis of statutory privilege. [ALJ decision pp. 10-12, App. 75-81 Ninth Circuit memorandum opinion p. 5. App. 9-11] The state statutory privilege recognized by the Board and the Court is, we submit, preempted by the NLRA. 29 U.S.C. §161 which grants the Board subpoena power to administer the NLRA preempts the Hawaii statute which purportedly prohibits disclosure of information in Board proceedings. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959); Machinists v. Wisc. Emp. Rel. Comm., 427 U.S. 132 at 136-137 (1976).

Courts under analogous circumstances have consistently held

that federal subpoena power preempts state privacy statutes. See, In Re Request For Judicial Assistance, 669 F.Supp. 403, 407 (S.D. Fla. 1987); In Re Grand Jury Subpoena (Conn. Sav. Bank), 481 F.Supp. 833 (D. Conn. 1979); In Re Grand Jury Subpoena For N.Y. State Income Tax Returns; 468 F.Supp. 575 (N.D. N.Y. 1979); appeal dismissed 607 F.2d 566 (2d Cir. 1979).

3. The "Reprehensible" Failure to Report Interim Earnings in Tax Returns Violates Public Policies Underpinning The Backpay Remedy and The Internal Revenue Code

Granting backpay to a claimant who admittedly failed to report interim earnings on his tax returns violated the policies of both the NLRA and the Internal Revenue Code.

A backpay award, although compensating an employee for unlawful conduct, is not a penalty, nor a private award for personal damages, but a sum given in the public interest and in vindication of public rights. Clayton-Willard Sales, 126 NLRB 1325-1326 (1968).

The Board's holding is inconsistent with the policies of the National Labor Relations Act. Awarding backpay to a claimant who defrauds the government hardly operates as a vindication of public rights. The decision also invites claimants to conceal interim earnings since they will not be sanctioned for failure to report them on their income tax reporting forms.

The decision also subverts the public policy behind truthful income reporting required by the Internal Revenue Code. 26 U.S.C. §6001.

The Supreme Court has twice held that the Board must be cognizant of public policies beyond those embodied in the Labor Act in fashioning remedies. See, Sure-Tan, Inc. v. NLRB, 467 U.S. 883 at 903-904 (1984); Southern S.S. Co. v. NLRB, 316 U.S. 31 at 47 (1941).

4. Failure to Toll Backpay Contravenes Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)

The Board found that the claimants were offered reinstatement on January 31, 1977, but that they would

lose seniority. 241 NLRB at 593-594 App. 402-404. The reinstatement offer should have tolled backpay pursuant to Ford, supra.

In Ford, a Title VII case, the Court held that backpay is tolled on an unconditional offer of reinstatement without retroactive seniority.[7/] The Court saw the anomaly if a claimant is required to accept similar employment by an alternative employer without seniority to mitigate damages but may reject employment with the respondent employer unless accompanied by an

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7/ The Court found that the backpay provision of Title VII was "expressly modeled" on the analogous, remedial provisions of the NLRA. 458 U.S. at 226, n. 8.

offer of retroactive seniority. 458 U.S. at 233 (n. 19). The Court reasoned that it was wrong to require an employer to, in effect, insure the Claimant against the risks that the employer might win at trial. 458 U.S. at 238, 240 (n.29). The Court noted that if the employee prevails, benefits he would have received pursuant to retroactive seniority can be calculated in backpay proceedings. 458 U.S. at 238-239.

The court erred in failing to apply these principles to the present case.

CONCLUSION

A grant of certiorari will present the Court with an important opportunity, on a full record, to

provide much needed guidance to the Board and practitioners with regard to procedural due process in backpay proceedings. Certiorari would also allow scrutiny of findings which appear in direct conflict with decisions of this Court concerning the nature of the backpay remedy, preemption and liability cutoff.

The petition should therefore be granted.

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